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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1969

No. 1066

IRVING ROSEN and SIDNEY A. KANTER,
Petitioners,

vs.

EASTERN AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1969

No. _____

IRVING ROSEN and SIDNEY A. KANTER,
Petitioners,

vs.

EASTERN AIR LINES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IRVING ROSEN and SIDNEY A. KANTER, your Petitioners, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgments of said Court entered in Case No. 25,235 on the 15th day of August, 1968 and the 29th day of November, 1968 (denying Rehearing).

OPINIONS BELOW

Fifth Circuit. The opinion of the Court below in this case (Appendix A, **infra**) the Judgment of said Court (Appendix B, **infra**) and the decision on Petition for Rehearing (Appendix C, **infra**) have not yet been reported.

District Court. The order of the District Court from which the appeal was taken to the Fifth Circuit culminating in the aforesaid decisions was not reported and is set forth in Appendix D, **infra.**

Eastern Air Lines, Inc. Flight Attendants' System Board of Adjustment. The award of said adjustment board and the opinion of the neutral member which was involved in the action before the said District Court, was not reported and is set forth in Appendix E, **infra.**

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit (Appendices A and B, **infra**) were entered on the 15th day of August, 1968. A timely Petition for Rehearing, accompanied by a Suggestion For Rehearing En Banc was denied on the 29th day of November, 1968 (Appendix C, **infra**). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Two employees were discharged while a collective bargaining agreement was in effect. After a hearing before a company officer the employees, being dissatisfied with the decision of said officer and seeking to avail themselves of the appeal provisions of the agreement, submitted their grievances to an arbitrator (the System Board of Adjustment) seeking review of the earlier proceedings and raising the primary issues of the failure of the company to comply with the contractual notice requirements and the insufficiency of the record then made to support the actions taken. Although never so requested the arbitrator proceeded to conduct a **de novo** hearing of the entire controversy, over the objections of the employees, which resulted in the discharges being upheld. The questions thus presented are:

1. Whether a lack of jurisdiction by the arbitrator (i.e. that denial of due process as would warrant and allow a collateral attack on the jurisdiction of the arbitrator) is the sole and exclusive basis upon which the Federal Courts may review the decision of the arbitrator.

2. Where the decision and award of an arbitrator on its face shows an intention to disregard the procedural due process requirements of the collective bargaining agreement, can such decision be reviewed by the Federal Courts no matter how cogent the substantive issues on the merits may be?

3. Where an arbitrator, in an attempt ostensibly to interpret the provisions of a collective bargaining agreement, ignores and disregards the plain and unequivocal requirements of the agreement and denies an employee the benefits thereof, or acts with respect thereto in an arbitrary, capricious or unreasonable manner, may such conduct be reviewed and remedied by the Federal Courts?

4. Where an employee is denied due process, as required in the collective bargaining agreement, does the unfounded decision of an arbitrator upon such questions constitute a denial of due process, as opposed to an adjudication on the merits?

5. Whether a denial of basic contractual rights of due process which occurs prior to the submission of the controversy to arbitration is absolutely and completely insulated from judicial scrutiny.

6. Whether the unauthorized departure by the arbitrator from the scope of submission of a grievance before it, is such a denial of due process as warrants judicial review.

STATUTORY PROVISIONS INVOLVED

The applicable statutory provisions sanctioning the creation of System Boards of Adjustment are set forth in 45 U.S.C. § 184 (Appendix F, infra). 45 U.S.C. § 159(3) (set out in Appendix F) lists the grounds upon which an arbitration award may be impeached, § 181 (set out in Appendix F) makes applicable to carriers by air the provisions of 45 U.S.C. §§ 151, 152, and 154-163, and § 182 (set out in Appendix F) makes applicable the duties requirements penalties, benefits and privileges of the same sections.

STATEMENT

A. Original Arbitration Proceedings:

Petitioners were employed by Eastern Air Lines, Inc. as stewards. They were discharged by letters dated May 17, 1965 (R. 99, 109) (Note: References are here made to the page numbers of the transcript of record as certified by the Fifth Circuit Court of Appeals). Pursuant to the provisions of the Collective Bargaining Agreement (R. 10-98) they filed grievances and the matter was heard before a company designated hearing officer who, although admitting that on the strength of the testimony adduced at the hearing he had no basis to uphold the discharges, found the discharges to be justified, ostensibly on the basis of subsequent investigations made without the presence of the employees. A transcript was made of the hearings (R. 141-252) but not of the subsequent investigations as required by the Collective Bargaining Agreement (R. 54). Under the appeal provisions of the contract the matter was submitted to the System Board of Adjustment for review (R. 134-136).

At the hearing before the Board the principal issues raised were the questions of the failure of the company to furnish the employees with precise charges in writing prior to the investigation and hearing as required by the contract (R. 52) so that the employees "shall be given the necessary time in which to prepare. . . . "; the failure to confine the review proceedings to the record made before the company hearing officer, in view of the fact that the issues in the letter of submission were not amplified or expanded by the company, as required by the contract, nor was any prior written request made by the company to introduce additional evidence and testimony,

as required by the contract; and as to alleged wrong doing on the part of the hearing officer in conducting the first stage hearing and investigation.

The decision of the Board, as stated in the Award and Opinion of the Neutral Member (Appendix E, **infra**) devoted one brief paragraph to the "Issue on the merits". As to the other issues it held that the discharge letters to the employees failed to meet the contractual requirement of precise charges in writing prior to the hearing but nevertheless that this requirement was met when during the course of the hearing the employees became aware by oral statements of the nature of the charges against them. Thus they were awarded compensation for an additional week (the period between the discharge letter and the date of the hearing). On the issue of whether a **de novo** hearing was warranted it held that since either party had the right to request in writing the privilege of presenting additional witnesses and documentary evidence "there was a valid contractual basis for receiving and considering additional evidence not included in the prior record of the case," notwithstanding that no such written request had been made nor had the issues within the scope of the submission letters been enlarged as required by the contract. On the issue of whether the company hearing officer was bound to confine his decision to the record made before him, it was held that he was warranted in basing his decision on the private investigation he made subsequent to the hearing, notwithstanding that the investigation contemplated by the contract is unquestionably that which is made prior to the hearing so that the employee might have an opportunity to explain and defend himself, and notwithstanding that no written record of such investigation

was made available to the employee. Finally it was held that there was no "sound basis for concluding that this System Board should refrain from dealing with the merits of these discharge grievances because of some aspect of procedural unfairness."

B. District Court Proceedings:

Actions were filed by the employees in the United States District Court (R. 1-9; 100-107) seeking review of the proceedings before the arbitrator pursuant to 45 U.S.C. § 151 et seq. and raising, inter alia, the matters previously discussed herein. These actions terminated in the Final Order of March 16, 1967 (Appendix D, infra) by which the District Court ruled that the arbitrator had exclusive jurisdiction to determine issues of whether the notice of discharge contained the "precise charges" required, whether the initial hearings met contractual requirements and whether there was just cause for the discharge of the plaintiffs; that the decision of the arbitrator was final and binding on those issues; that the Court could review only to determine if plaintiffs received due process in the hearing before the arbitrator but not in the preliminary hearings in the grievance procedure; and that the hearing before the arbitrator met all due process requirements.

C. The Decision of the Court Below:

An Appeal was taken by the employees to the Fifth Circuit which resulted in the opinions, orders and judgment to which this petition is directed, affirming the judgment of the District Court. A petition for re-hearing and a suggestion for re-hearing en banc was timely filed by the appellants. The same, which are included in the transcript of record filed herewith, were denied.

REASONS FOR GRANTING THE WRIT

The issues presented in this petition concern certain aspects of the labor relations field of law, a subject which has been brought before this Court and in countless decisions has, almost to the point of tradition, been regarded as involving matters of great public importance justifying, where warranted, the assumption of jurisdiction by this Court by writ of certiorari. On numerous occasions in the past this Court has been called upon to rule upon the jurisdiction, scope, and legal effect of arbitration decisions under the Railway Labor Act, initially by the National Railroad Adjustment Board, and subsequently, in the field of air transportation, by private industry boards of adjustment sanctioned and created pursuant to the enactments of 49 Stat. 1189, 45 U.S.C. §§ 181-188. In consequence, the legal effects and ramifications of the decisions of private boards have come to be equated (with some exceptions not in controversy herein) with those of the N.R.A.B. Thus as this Court has prescribed and settled guidelines governing the scope of permissible court review of such arbitration decisions, they have been made equally applicable to both fields of transportation. That this intended consequence is vital and beneficial is beyond question; but, at the same time, it has resulted in some degree of confusion and conflict in the decisions of the several lower Federal Courts, which is a compelling reason to warrant a reconciliation and clarification of the principles of law which have emerged. At the crux of the problem are the inherent differences which arise from the methods of procedure in settling labor grievances in railroad vis-a-vis airline cases. In the former the procedures are the product of statutory (and common law) prescription; in the latter, they result from con-

tractual agreements. While the Federal Courts have freely applied relevant principles from one field to the other, without regard to such inherent distinctions, it becomes more and more apparent that the tendency to apply broad sweeping legal principles universally must be limited and qualified in accordance with logic and reason and the circumstances peculiar to each individual case. For example the attention of this Court is directed to the obvious disparity which arises from conflicting judicial views as to the position and status of the arbitrator in the case of a governmental agency as opposed to a private industry board. Contrast the language of this Court in **Pennsylvania Railroad Company v. Day,** 360 U.S. 548, 79 S.Ct. 1322, 3 L.Ed.2d 1422 (1959), wherein the expertise of the N.R.A.B. is lauded as justification for the reliance thereon by the Courts, with the language of the Fifth Circuit Court of Appeals in **Safeway Stores v. Am. Bakery and Confectionery Workers International Union, Local 111,** 390 F.2d 79 (1968) wherein some doubt is cast upon the efficacy of non-governmental agency arbitrators. If such a distinction is to be recognized by the Courts, should not the consequences of such distinction be given legal effect, as well? In the instant case such a distinction becomes critical because the decisions of the Fifth Circuit and the District Court below are mainly founded upon the case of **Edwards v. St. Louis-San Francisco R. Co.,** 361 F.2d 946 (7th Cir. 1966). Herein the lower court's reliance upon and adoption of the principles announced in **Edwards** is attacked both upon the ground that the underlying principle is an important question of federal law which has not been, but should be settled by this Court and also upon the ground that the application of such principle to an airline case (with the distinguishing circumstances necessarily involved) is

similarly an important question of federal law which has not been, but should be settled by this Court. As further reasons for the granting of the Writ of Certiorari we respectfully submit that the Court below has decided federal questions in conflict with both the letter and spirit of applicable decisions of this Court and other Circuit Courts of Appeal upon the same subject.

I.

THE DECISION BELOW INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN SETTLED BY THIS COURT.

Questions #4 and #5 as stated above initially arose when the Fifth Circuit and District Court decided that regardless of what denials of due process (i.e. contractual procedural provisions guaranteed to all employees) may have occurred prior to the submission of the controversy to the arbitrator they could not be reviewed by the Federal Courts. Going one step further they then held that any ruling by the arbitrator with respect to the due process questions raised (either as to proceedings prior to submission or as to the subject of the hearing itself) having once been resolved by the arbitrator became adjudications on the merits and, as such, unreviewable. This is a unique application of the principles of law involved.

Such position proceeds from reliance on the **Edwards** case, **supra,** and is crystallized in the District Court's Fourth Conclusion of Law (R. 122-3): "This Court has jurisdiction to make a review to determine that the plaintiffs received due process in their hearing before the System Board of Adjustment, but this jurisdiction does not extend to preliminary hearings in the grievance

procedure prior to the hearing before the System Board of Adjustment". In so deciding the Courts below rejected the contentions of petitioners that the **Edwards** case was distinguishable on its principles and facts in several particulars; that denials of due process sanctioned and perpetuated by the arbitrator became denials of due process by the arbitrator; that the arbitrator's interpretation of the collective bargaining agreement in **Edwards** was not arbitrary, capricious and unreasonable, as contrasted with the instant case wherein the arbitrator chose to ignore the plain and unequivocal requirements of the contract; that in **Edwards** it was conceded by both sides that there was no denial of due process by the arbitrator; that the decision in **Edwards**, by its own language, was in part motivated by overriding considerations of public interest (see at p. 955) which were not involved in the instant case; that the Court in the **Edwards** decision clearly implied that there is some limited measure of inquiry permissible by the Courts into preliminary proceedings; that there if a difference between the inherent reliability of the actions of a skilled "professional" board (the N.R.A.B., as in **Edwards**) and a private industry board.

II.

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEAL.

It is a fundamental and well-established principle that the concept of the finality of an arbitrator's decision under the Railway Labor Act imports that the same may not generally be reviewed by the Courts on its merits but only so as to determine whether the arbitrator

by his conduct has effected a denial of due process. The problem here, however, comes from a lack of definition and clear expression by the Courts of where "due process" questions end and "merits" questions begin. It logically follows that if an arbitrator, in interpreting the procedural requirements of a collective bargaining agreement from which he derives his jurisdiction and authority does so capriciously or arbitrarily or in a manner clearly unauthorized, that interpretation, while technically a decision on the merits, may nevertheless be assailed as a denial of due process.

While the growing trend appears to be a liberalization in those areas where judicial review is permissible, as observed by Mr. Justice DOUGLAS in his dissenting opinion in **Union Pacific Railroad Co. v. Price**, 360 U.S. 601, 619, 79 S.Ct. 1351, 1361 (1959), based upon the line of decisions cited therein, the decision below is clearly a step in the opposite direction. It has the effect of circumscribing and restricting the area of permissible court review, by suggesting now that a lack of jurisdiction (i.e. that denial of due process as would warrant and allow a collateral attack on the jurisdiction of the arbitrator) is the only basis upon which such review may be had. As authority for this proposition the Fifth Circuit apparently relies upon its earlier decision in **Wooley v. Eastern Air Lines**, 250 F.2d 86 (5th Cir. 1957) and upon the decision of this Court in **Gunther v. San Diego and Arizona Eastern Ry.**, 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed.2d 308 (1965). In **Wooley**, however, the decision of the Court has an opposite implication since the decision therein actually turned upon a finding that the procedural defect complained of had been waived. In **Gunther** this Court refused to overturn the decision of the N.R.A.B. on the

merits of the "wrongful removal issue" where the interpretation of the collective bargaining agreement by the arbitrator was not wholly baseless and completely without reason. The Fifth Circuit did not proceed on this basis. No attempt was made to decide whether or not the decision of the arbitrator was without legal foundation or that his interpretation of the contract was not arbitrary or capricious, as petitioners had contended. Rather the Fifth Circuit treated these as areas where judicial inquiry was absolutely foreclosed.

45 U.S.C. § 159(3) lists the grounds upon which an arbitration award may be impeached. (See Appendix F, **infra**). It is obvious that these comprehend far more than the limited scope of review suggested by the Fifth Circuit's decision. It is true that this provision is not strictly applicable to proceedings before a System Board of Adjustment but it does provide pertinent guidelines. Moreover in **Farris v. Alaska Airlines** (D.C. Wash. 1953), 113 F.Supp. 907 it was specifically held that this section was applicable to carriers by air and that the Court might properly consider, inter alia, whether the Board's procedure and award conformed substantially to statute and agreement and whether the award confined itself to the letter of submission (both of which contentions are raised herein and were in issue before the Courts below).

In **Edwards v. Capital Airlines** (C.A.D.C. 1949), 176 F.2d 755, 84 U.S. App. D.C. 346, it was held that while the award of a "System Board of Adjustment" is entitled to presumptive weight of validity and one seeking to upset the same must bear a considerable burden, it is nevertheless subject to judicial examination.

In **Arnold v. United Air Lines, Inc.** (C.A. Ill. 1961), 296 F.2d 191, it was held that although a District Court may not be concerned with whether it would reach the same conclusion as a System Board on the merits of the grievance, it might nevertheless determine whether the Board's decision was arbitrary or capricious.

In **United Steelworkers of America v. Enterprise Wheel and Car Corp.**, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960) this Court held that an arbitrator is confined to interpretation and application of the collective bargaining agreement and that his award is legitimate only so long as it draws its essence from the collective bargaining agreement. In short, the arbitrator cannot ignore the plain and unequivocal requirements of the agreement, nor can he reform the contract under the guise of interpreting it. "He does not sit to dispense his own brand of industrial justice".

This case furnished the authority for the decision in **Local 791, Int'l Union of Electrical, Radio and Machine Workers v. Magnavox Co.** (6th Cir. 1961), 286 F.2d 465, wherein it was held that the function of an arbitrator is judicial rather than legislative and he has no power to add to, ignore or modify any of the terms of the collective bargaining agreement nor to decide issues not directly involved in the case.

Ironically we find the same Fifth Circuit, in a decision reported subsequent to its decision in the instant case, and in a complete reversal of form, ruling in the **Safeway Stores** case, **supra**, that even though the subject of the grievance is within the scope of the agreement to arbitrate, the award of the arbitrator is not insulated

from judicial scrutiny altogether and if the arbitrator's reasoning is so palpably faulty that no judge or group of judges could ever conceivably have made such a ruling, then the Court can strike down the award.

Returning briefly to the questions #1, #2, #3, and #6 as stated above we respectfully submit that the answers to these questions suggested by the above authorities, as well as others (e.g. 1966 Committee Reports of the American Bar Association, Section of Labor Relations Law, excerpts of which are set out at length in the appellants' Petition for Rehearing (R. 395-6) but not repeated here for the sake of brevity, in which the scope of judicial supervision over arbitration awards is considered) are in direct conflict with the decision of the Court below.

CONCLUSION

The decision below is palpably erroneous. The arbitrator's award was attacked upon appeal to the Fifth Circuit on the basis that it was arbitrary and capricious, it clearly ignored the specific requirements of the collective bargaining agreement, it failed to confine itself to the scope of submission presented, it manifested an intent to disregard and dispense with aspects of procedural unfairness, and it sanctioned and perpetuated the denial of contractual rights of due process of the petitioners. Although there are numerous authorities which hold that some of these acts are clearly grounds upon which judicial review is permissible and warranted (and there being no contrary judicial pronouncements upon the others, except by implication of the decision below) the Fifth Circuit made no findings directly controverting or rejecting these contentions. Specifically ignoring these issues, it based its decision upon unwarranted generalities, the results of which were the creation of conflicts of authorities and the pronouncement of rules of law, not heretofore decided by this Court, which are patently erroneous.

For the reasons stated this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION BELOW

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

(August 15, 1968)

Before POPE*, TUTTLE and CLAYTON, Circuit Judges.

PER CURIAM: Appellants, Rosen and Kanter, were flight attendants for Eastern Air Lines until they were discharged by Eastern because of the way in which they han handled liquor service on a flight on May 13, 1965. After this flight, appellants were questioned about the liquor service, and on May 17, 1965, they were notified by letter of their discharge. This letter from Eastern stated the reason for the discharge to be "your handling of the liquor service on Flight 4 on May 13, 1965". There was then in effect between the Airline Stewards and Stewardesses Association and Eastern Air Lines a collective bargaining agreement which had been adopted under the provisions of the Railway Labor Act, 45 U.S.C.A. § 151, et seq., and under its provisions, Rosen and Kanter elected to file grievances with the hearing officer. On May 28, 1965, the hearing officer upheld the discharges. Under the aforementioned agreement, Rosen and Kanter appealed from this decision to the Eastern Air Lines Flight Attendants System Board of Adjustment. This Board upheld the discharges but also decided that the letter notifying the appellants of their discharge was defective in that it did not give the "precise charges" against them as provided in § 15(A)4 of

*Of the Ninth Circuit, sitting by designation.

the agreement. It was there also decided that even though the "precise charges" were not included in the letter of discharge appellants were not prejudiced, since the record before the board reflected that the appellants were well aware of the nature of the charges against them, which were that Kanter had underreported the number of drinks sold and that Rosen had overreported the number of complimentary drinks served. Although finding that appellants could not successfully contend that their discharges were void merely because of the formal defect which existed between May 17 and May 24, 1965, they nevertheless held that they were entitled to one week's additional pay as compensation for the period between the date of the letter of discharge and the date of formal notice o fthe "precise charges". Appellants' contention that the hearing officer should have relied solely on the evidence presented before him at the hearing instead of making an additional investigation of him own was rejected.

By their suit which was filed in district court, appellants sought reinstatement, back pay, punitive damages and a review of the holding of the System Board. They were denied any relief there and have appealed here. We affirm.

Appellants claim here that they were denied constitutional and "industrial" due process because (1) no precise written charges have been filed against them as required by the agreement, (2) that the hearing officer should not have conducted his own investigation, and (3) that the system board should not have held a de novo hearing but, instead, should have limited itself to the record made before the hearing officer, find no support in either statutory or case law and are without merit.

Appellants' contention at this late date that they never have known the nature of the charges is specious. The System oBard found that they had actual notice of the charges against them at least from the date of the hearing before the hearing officer, if not before, and the district court correctly held that the decision of the System Board on whether appellants were properly discharged or not is final and binding on the courts and not subject to review on the merits by the courts. It was also correctly decided there that the courts can reverse the System Board only where there is a denial of due process before the oBard and that such a review does not extend to proceedings before submission to the Board. These actions of the district court are firmly established in earlier cases before this court and by cases decided by the Supreme Court. In *Gunther v. San Diego and Arizona Eastern Ry.*, 382 U.S. 257 (1965), with respect to the reviewability of awards made under the Railway Labor Act, 45 U.S.C.A. §151, et seq., said the following:

> This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railway Adjustment oBard.
> * * *
> The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court. 382 U.S. at 263-64.

This court has consistently followed *Gunther* in holding that district courts have no authority to review the System Board's awards. See *Southern Pacific Company v. Wilson*, 378 F.2d 533 (5 Cir. 1967); *Hodges v. Atlantic C. L. R. Co.*, 363 F.2d 534 (5 Cir. 1966); and *Rittle v. REA Express*, 367 F.2d 578 (5 Cir. 1966). There are , however, very limited situations where the actions of a system board, authorized by the Railway Labor Act (supra) where cour review is available. These can arise only where there has been a denial of due process by some act of the Board in making an award. *Southern Pacific Company v. Wilson*, supra, and *Edwards v. St. Louis-San Francisco Railway Company*, 361 F.2d 946 (7 Cir. 1966).

The actions of the System Board toward the appellants do not reveal any evidence of a denial of fundamental or "industrial" due process which would invest a federal court with authority to review the action of that Board. For such authority to exist, there must be a sufficient denial of due process to allow a collateral attack on the jurisdiction of the System Board. *Woolley v. Eastern Air Lines*, 250 F.2d 86 (5 Cir. 1957).

It is the voluntary act of the employee which gives the actions of the System Board such final authority. Upon his discharge, an employee has a choice—he may sue in court for a breach of contract of employment, or he can proceed under the agreement and the Railway Labor Act before the Board. He may not do both. Hence, "granted jurisdiction in the Board, its decisions on either factual or legal or mixed issues, are not reviewable in court." *Woolley v. Eastern Air Lines*, supra.

Appellants' claim of unfair treatment before the hearing officer may not be considered here. Federal courts are without authority to review even a denial of due process which occurs prior to the actions of the System Board. *Edwards v. St. Louis-San Francisco Railway Company*, supra. The remedy for mistreatment before the hearing officer is in the hands of the System Board, not the federal courts. And, appellants' complaint that the Board went outside the record made by the hearing officer necessarily involves an interpretation of a provision of the agreement under which these proceedings were conducted. The only issue made here is that the appellants do not agree with the interpretation placed on this provision by the System Board. As has been stated, the interpretation of the Board is binding on the courts.

With what we have said, it is now necessary for us to consider the contention made by appellee that appellants' complaint fails to state a cause of action under the 1966 amendments to "§3 First" of the Railway Labor Act, 45 U.S.C.A. § 153, except to say that it is novel since this section is not applicable to airlines. See 45 U.S.C.A. §§ 181, 182, 184 and *Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963).

Disposition made of this case in the district court was right. The case is

AFFIRMED.

APPENDIX B

JUDGMENT BELOW

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

Before POPE*, TUTTLE and CLAYTON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Irving Rosen and Sidney A. Kanter, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 15, 1968

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*Of the Ninth Circuit,
sitting by designation.

Issued as Mandate: Dec. 9, 1968

APPENDIX C

ORDER ON PETITION FOR REHEARING

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING EN BANC

(November 29, 1968)

Before POPE*, TUTTLE and CLAYTON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Judge Clayton, on account of illness, took no part in the consideration or decision of this order denying the Petition.

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*Of the Ninth Circuit, sitting by designation.

APPENDIX D

FINAL ORDER OF DISTRICT COURT

(TITLE OMITTED)

[120]

FINAL ORDER OF DISTRICT COURT

Filed Mar. 16, 1967.

United States District Court for the Southern District of Florida, Miami Division.

Irving Rosen, Plaintiff,

vs. No. 66-743-Civ-(WOM).

Eastern Air Lines, Inc., a Delaware corporation, Defendant.

Sidney A. Kanter, Plaintiff,

vs. No. 66-743-Civ-(WOM).

Eastern Air Lines, Inc., a Delaware corporation, Defendant.

By stipulation of the parties approved by Order of this Court dated December 7, 1966, the above cases were consolidated for trial upon an agreed upon record, trial by jury being waived. Both parties submitted briefs and final argument was heard by the Court on March 3, 1967.

The Court having reviewed the record and the briefs and being fully advised, makes the following Findings of Fact, states the following Conclusions of Law, and enters the following Judgment:

Findings of Fact.

1. Defendant is a common carrier by air within the meaning of the Railway Labor Act.

2. The Court finds that the plaintiffs were discharged by the defendant on May 17, 1965.

[121] 3. Plaintiffs filed grievances pursuant to the collective bargaining agreement between defendant and the Air Line Stewards and Stewardesses Association and on April 8, 1966, the applicable System Board of Adjustment rendered its decision upholding the discharge of the plaintiffs.

4. The hearing before the System Board of Adjustment was a de novo proceeding.

5. In this action the plaintiffs ask the Court to issue a mandatory injunction requiring defendant to reinstate the plaintiffs and award them back pay and punitive damages. The primary grounds relied upon by the plaintiffs are:

(a) The plaintiffs, when discharged, were not given notice of the "precise charges" as required by Section 15A of the collective bargaining agreement;

(b) Plaintiffs did not receive due process in the hearing held pursuant to Section 15A of the collective bargaining agreement by a company hearing officer; and

(c) The testimony of the witnesses for the defendant before the System Board of Adjustment was conflicting and contradictory and did not provide a sufficient basis for the decision of the System Board of Adjustment upholding the discharges.

6. The same issues were before the System Board of Adjustment and were decided adversely to the plaintiffs except to the extent that the System Board of Adjustment awarded the plaintiffs damages of one [122] weeks' pay to compensate for any alleged deficiencies in the preciseness of the charges.

Conclusions of Law.

1. This Court has no jurisdiction to grant the requested relief of reinstatement, back pay, and punitive damages. Slocum v. Delaware, L. & W. R. R., 339 U.S. 239 (1950); Moore v. Illinois C. R. R., 312 U.S. 630 (1941). In the proper case the Court would have authority to remand the matter to the System Board of Adjustment for rehearing or reconsideration.

2. The System Board of Adjustment had exclusive jurisdiction to determine issues regarding whether or not the notice of discharge contained the "precise charges" required by Section 15A of the collective bargaining agreement, whether or not the hearing before the company appointed hearing officer met the requirements of Section 15A, and whether or not there was just cause for the discharge of plaintiffs. This exclusive jurisdiction includes the authority to resolve factual disputes and determine the weight to be given to the evidence.

3. The decision of the System Board of Adjustment on such issues is final and binding and is not subject to review on the merits by the Courts. Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257 (1965); Hodges v. Atlantic Coast Line Railroad Co., 363 F. 2d 534 (1966); Rittle v. R.E.A. Express, 367 F. 2d 578 (1966).

4. This Court has jurisdiction to make a review to determine that the plaintiffs received due process in [123] their hearing before the System Board of Adjustment, but this jurisdiction does not extend to preliminary hearings in the grievance procedure prior to the hearing before the System Board of Adjustment. J. W. Edwards v. St. Louis-San Francisco R.R., 361 F. 2d 946 (1966).

5. A review of the record before the System Board of Adjustment and the decision of that Board establishes that the hearing accorded the plaintiffs by the System Board of Adjustment met all due process requirements.

Judgment.

By reason of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Judgment is in favor of the defendant and against the plaintiffs.

2. The defendant shall recover of plaintiffs its costs incurred in this action.

Done, Ordered and Adjudged at Miami, Florida, this 15th day of March, 1967.

W. O. MEHRTENS,
(W. O. Mehrtens),
United States District Judge.

* * *

APPENDIX E

AWARD OF SYSTEM BOARD OF ADJUSTMENT AND OPINION OF NEUTRAL MEMBER

BEFORE THE EASTERN AIR LINES, INC. FLIGHT ATTENDANTS' SYSTEM BOARD OF ADJUSTMENT.

Case Nos. 16-65 and 17-65 (EAL), 65-63 and 65-64 (ALSSA).

GRIEVANCES OF:

IRVING ROSEN
and
SIDNEY A. KANTER.

AWARD.

1. The issue of whether or not the grievants were furnished precise charges in compliance with Section 15 A.4. of the Agreement is properly before this Board.

2. The requirements of Section 15 A.4. were complied with at least by May 24, 1965.

3. The grievants are to receive compensation on the basis of what they would have earned if their employment had been terminated on May 24, 1965 instead of May 17, 1965.

4. The record before this System Board properly includes all evidence adduced at the hearing conducted on July 19 and 20, 1965.

5. The grievants are not entitled to reinstatement because of the state of the record made at the hearing before the first step hearing officer.

[2] 6. The grievants are not entitled to reinstatement because the Company brought forward evidence at the hearing before this System Board which it had not produced at the hearing before the first step hearing officer.

7. The grievants are not entitled to reinstatement because of any other aspect of procedural unfairness or lack of industrial "due process".

8. On the merits the Company was justified in discharging Sidney Kanter and Irving Rosen under all the facts and circumstances established by the record in this case.

PAUL H. SANDERS,
(Paul H. Sanders),
Neutral Member.

GEORGE A. MARTIN.
H. J. SLAGER.
STEPHEN CHESELKA.
JEANNE H. NOTARO.

April 8, 1966.

[3] Before the Eastern Air Lines, Inc. Flight Attendants' System Board of Adjustment.

Grievances of:

Irving Rosen and Sidney A. Kanter.

Case Nos. 16-65 and 17-65 (EAL), 65-63 and 65-64 (ALSSA).

Opinion of Neutral Member.

The Eastern Air Lines, Inc. Flight Attendants' System Board of Adjustment, with Paul H. Sanders as neutral member, heard the discharge grievances of Irving Rosen and Sidney A. Kanter in Miami, Florida on July 19 and 20, 1965. In addition to the Neutral, the System Board of Adjustment consisted of Mr. Stephen Cheselka and Miss Jeanne H. Notaro, appointed by the Air Line Stewards and Stewardesses Association (ALSSA); and George A. Martin and H. J. Slager, appointed by Eastern Air Lines, Inc. The grievants were represented by Mr. Lee Leibik, Attorney at Law, Leibik and Weyand, Chicago, Illinois. Mr. William G. Bell, Jr., Attorney at Law, Gambrell, Harlan, Russell & Moye, Atlanta, Georgia, appeared for the Company. In addition to the record made on July 19 and 20, 1965, there was incorporated transcripts of the hearings conducted on May 24, 1965 by a Company-designated hearing officer with respect to the same grievances. The System Board of Adjustment and the Neutral Member also listened to the recorded tapes of the earlier hearings.

On November 26, 1965 the Neutral Member informed the attorneys for the parties and the other members [4] of the System Board of Adjustment that he had definitely concluded: that the System Board should reach the merits of the cases; that the Company had adequate cause for termination of the grievants; and that there should be no order of reinstatement in the Award. In the same notice the Neutral Member stated his desire to keep the case under advisement for the purpose of determining what back pay, if any, should be provided in the proposed Award by reason of questions related to the adequacy and timing of the notice given to the grievants with respect to the reasons for their discharge.

Factual Background.

On May 17, 1965 substantially identical letters were addressed to the two grievants in this case stating that their employment with Eastern Air Lines, Inc. was being terminated with the explanation: "The reason for this action is your handling of the liquor service on Flight 4 [and Flight 50 in the case of grievant Rosen] on May 13, 1965". On May 19, 1965 identical letters were submitted to the Company's Director of In-Flight Services by each of the grievants requesting an investigation and hearing for the letter of discharge. The Company's Manager of Manpower Control, In-Flight Services, conducted a hearing on May 24, 1965 at which the grievants were present, along with the Vice President of the Association. On May 28, 1965 the Company-designated hearing officer notified each of the grievants to the effect that he had held an investigation and hearing with regard to the grievance and that, after a review of what had been presented "and further investigation", [5] he found the Company's discharge action to be justified.

On June 18, 1965 the President of the Association submitted to the Chairman of the System Board of Adjustment the discharge grievance of each of the two grievants involved in this case. In this submission under the heading, "Question at Issue", it is stated: "Was the Company justified in the discharge of Sidney Kanter [Irving Rosen] under all the facts and circumstances of this case?"

The Scope of the Issues Before the Board.

The attorney for the grievants declares that the first issue presented to the System Board in this case is whether or not the discharges are void for failure of the Company to comply with the section of the Agreement which requires the furnishing of precise charges prior to the investigation and hearing by the Company-designated hearing officer. The Company, on the other hand, argues that the foregoing question is not properly before this Board; that the question at issue as stated in the submissions relates only to the merits; that a grievance relating only to the propriety of a discharge does not include objections to the procedure following after a discharge; that the grievants specifically chose to file an entirely separate grievance over the alleged violation of the section of the Agreement requiring the furnishing of precise charges; and that the issue in that grievance (19-65) is not within the jurisdiction of this Board.

[6] The Neutral Member believes that the position of the Company on this point should be rejected. It is his opinion that the matter submitted to this Board included compliance with such procedural requirements as were applicable to the discharge and continued separation of the grievants from their employment with the Company. The stated issue submitted is essentially the same as the existence of "just cause" for discharge. It makes specific reference to "all the facts and circumstances". This would reasonably include "all the facts and circumstances" in existence on or before June 18, 1965, the date of the submission. In the opinion of the Neutral Member the issue of justification or "just cause" includes compliance with all specified procedures in the

Agreement. In other words, procedural due process is an aspect which may be properly taken into consideration under a general inquiry into justification. It is clear that in this case the two grievants raised the subject of compliance with Section 15 A.4. of the Agreement requiring the furnishing of precise charges at the very beginning of the hearing before the Company-designated hearing officer on May 24, 1965. It is true that on May 25, 1965 the two grievants addressed a letter to the Company's Director of In-Flight Service requesting an investigation and hearing with regard to the Company's violation of Section 15 A.4. The evidence in the record does not persuade the Neutral Member that there was a deliberate omission of the matter of compliance with Section 15 A.4. in the grievances as originally filed on May 19, 1965. It would appear that the second grievance was filed out of an abundance of caution. It cannot be taken as con-
[7] trolling the proper scope of the grievances as originally filed.

Notice-of-Charges Issue.

Section 15 A. of the Agreement between the parties provides that a flight attendant shall not be dismissed without notification in writing as to such action and without "an investigation and hearing" provided such is requested within ten days after receiving notification of dismissal. It is further provided that the investigation and hearing shall be held by a Company-designated official other than the Flight Attendant's immediate supervisor. Section 15 A.4. which is of major importance in this case reads:

"4. Prior to such investigation and hearing, the Company shall furnish such Flight Attendant a copy of the precise charge or charges against him/her, with two (2) copies to the Association, and he/she shall not be required to give testimony or furnish evidence prior to the actual time of the investigation and hearing. He/she shall be given the necessary time in which to prepare and to secure the presence of witnesses and shall have the right to be represented by an employee of the Company of his/her choice or by his/her duly accredited representative or representatives."

Section 15 A. of the Agreement goes on to provide that after the close of the investigation and hearing "the Company shall announce its decision in writing" and furnish copies to the Flight Attendant and the Association. Under Section 15 B. there is provision [8] for appeal hearing before a senior official of the Company. In the case of a discharge, however, it is specifically provided that appeals shall be made directly to the System Board of Adjustment sitting with a Neutral.

The letter notifying each grievant of his discharge gives as the reason "your handling of the liquor service" on a specified flight or flights on a specified date. This letter obviously does not specify any precise details with respect to the handling of the liquor service" on a specified flight or flights on a specified date. This letter obviously does not specify any precise details with respect to the handling of the liquor service. The Neutral Referee does not believe that the term "precise charges" in the Collective Agreement requires the setting forth of every detail or the revealing of every portion of the Com-

pany's evidence. The underlying idea of 15 A.4. is not technicality but substantial fairness to an accused employee. He must be given sufficient notice in advance of the investigation and hearing so that he will be reasonably informed as to the matters which are being asserted against him in order that he may bring pertinent information to the attention of the investigating and hearing officer.

There is nothing in the record in this case which would justify the conclusion that the notice contained in the letters to the grievants was misleading or misinforming so that the grievants were actually prejudiced by the form of the notice. In the judgment of the Neutral the record, in fact, indicates that the grievants were well aware of the reason for Company action. The statements given by each of the [9] grievants on May 14, 1965 (Company Exhibits 37 and 38) reflect an awareness of the aspects of liquor service which was involved in the Company's action. In any event, it is clear that at the very beginning of each hearing conducted on May 24, 1965 detailed charges involving the mis-handling of liquor service were read into the record alleging that Kanter under-reported the number of drinks sold and that Rosen over-reported the number of complimentary drinks served. As the Neutral has observed, it would appear from the record that each of the grievants was actually aware that the Company was concerned with these aspects of liquor service several days in advance of the May 24 hearing. Certainly there is nothing in the record to show that the grievants were in any way hindered in the presentation of a defense by the Company's failure to set forth details in its letter of May 17, 1965. Since we are concerned with basic fairness

rather than a rigid technicality, it is important to note that on and after May 24, 1965 there could not have been reasonably asserted any lack of actual notice with regard to charges.

While under all the circumstances of this case it could well be concluded that the Company substantially complied with Section 15 A.4. in its letter of May 17, 1965, there are certain technical difficulties which merit discussion. In the first place, the Company's letter of May 17, 1965 makes no express charge of misconduct. Section 15 A.4. refers to "precise charges". It would seem that this would normally require an affirmative express charge of misconduct or other defect or deficiency. This should not be left to implication, although in this case it must be admitted that the implication is very obvious. In the [10] next place, "precise charges" would normally require not only a designation of the area of activity, but the particular aspect of the area involved in the charge of misconduct or dereliction. There are several distinct ways in which there might be mis-handling of the liquor service. "Precise charges" would normally require a designation of the specific aspect. The record in this case, however, shows that the grievants were aware of the specific aspect; that the grievants were not prejudiced by the absence of greater detail in this respect in the Company letters dated May 17, 1965; and that in any event the grievants received detailed charges with regard to the specific aspect at the beginning of the hearing on May 24, 1965. While the grievants cannot claim that their discharge should be voided merely because of formal defects existing between May 17 and May 24, 1965, they were entitled to have full compliance with Section 15 A.4. from the date that the Company

purported to comply with that provision. The Neutral Member is of the opinion that by reason of the formal defects that existed between May 17 and May 24, 1965, the grievants should in any event be compensated by receiving such additional pay as they would have earned if they had remained in the Company's employment through May 24, 1965.

The Record Issue.

In addition to the procedural issue related to the furnishing of precise charges, the grievants contend that this System Board should not have permitted the Company to present witnesses and exhibits for the first time before it. On behalf of the grievants it [11] is argued that the System Board of Adjustment sitting with the Referee can only consider and review the record made before the Company hearing officer and that admittedly, that officer did not have enough evidence at the hearing before him to justify the discharge.

The Neutral Member does not believe that it is necessary to restrict the record in this case to that which was made at the hearing conducted by the Company-designated hearing officer. This System Board, in fact, has received and considered the prior record in both written and audible form. Paragraph 13 of the System Board of Adjustment Agreement between the parties states that the Board and the Referee shall consider and review the prior record in the case and may call such additional witnesses and receive such additional evidence as the Board may deem necessary. Paragraph 13 goes on to state, "Either party may make written request to the Board for the privilege of presenting additional witnesses or

documentary evidence, and the Board, with the Referee, may at their discretion, permit such presentation". It is clear that if nothing more than Paragraph 13 is considered, there would be a valid contractual basis for receiving and considering additional evidence not included in the prior record in the case. It should be pointed out, however, that Paragraph 13 is assuming that there has been a hearing before a four man System Board of Adjustment pursuant to Paragraph 10 of the System Board of Adjustment Agreement. Paragraph 10 states that, "Evidence may be presented either orally, or in writing, or both". If all of Section 15 relating to investigation and hear-
[12] ing is read in conjunction with the entire System Board of Adjustment Agreement, it becomes very evident that the Board in this case is not restricted to what appeared in the record of the hearing made by the Company-designated hearing officer at the first step. Since the prior record will not include a System Board of Adjustment hearing, it would appear that Paragraph 10 of the System Board Agreement is directly applicable insofar as the presentation of evidence is concerned. This System Board, therefore, together with the Neutral Member, may consider the entire record that was made at the hearing in this case, as well as the prior record before the Company hearing officer.

The First Step Hearing Issue.

On behalf of the grievants it is argued that reinstatement is required because the Company failed to establish at the hearing and investigation before the first step hearing officer any just cause for discharge. Much of the evidence which was presented by the Company at the hearing before this System Board was not introduced at the hearing before the Company-designated hearing offi-

cer. The contradictory statements of other flight attendants were read into the record at the hearing before this hearing officer, but the flight attendants in question were not present at the hearing. At the hearing in question the Company official responsible for discharge stated that he was acting on the basis of information given to him by the Company Security Director, as well as on the basis of the discrepancies between the liquor reports and the statements of other flight attendants. There is thus no question but that the Company had infor-
[13] mation available to it which was utilized in the discharge of the grievants which information was not revealed at the first step hearing attended by the grievants and their representative. The first step hearing officer in his letter of May 28, 1965 to each grievant makes it clear that he finds the Company's action of discharge justified on the basis of facts presented at the hearing "and further investigation".

The Neutral Member does not see that under Section 15 A. of the Agreement between the parties there is any contractual obligation upon the Company to put all of its available evidence upon the record being made before the Company-designated official who has the responsibility for conducting an investigation and hearing. It is significant that the word "investigation" is used in addition to "hearing" in describing the function of the first step hearing official. The investigative functions of the first step official are not restricted to the conduct of a hearing at which the grievant is present. While a hearing must be held when properly requested and an accused person is entitled to be present in order to give testimony and furnish evidence and to have the presence of witnesses on his behalf there is nothing in the contract which would suggest that the Company official may not make an investigation of the charges apart from what is brought

out at the hearing. This Company-designated hearing official is, in effect, directed to investigate, as well as hear, before acting for the Company to announce a decision. His decision after the close of the investigation and hearing is that of the Company, not that of an independent quasi-judicial tribunal. In light of this, it is immaterial that the first step hearing officer felt that the rec-
[14] ord of the hearing before him did not show adequate cause for discharge. There is no doubt but that this same officer felt there was adequate cause for discharge on the basis of his complete investigation and hearing.

The Neutral Member has already indicated that it would do violence to Paragraph 10, as well as 13, of the System Board of Adjustment Agreement between the parties to impose a requirement that would forbid the introduction or consideration of additional evidence at the hearing before the System Board itself. If the grievants, hearing evidence against them for the first time at the System Board hearing, had desired additional time for investigation and the preparation of a defense, this additional time could have been secured for the asking. No such request was made and the grievants continued to insist that it was improper for the System Board to pay any attention at all to evidence other than that which had been produced at the original hearing before the first step hearing officer. The grievants are certainly entitled to insist upon the Company proceeding with basic fairness as well as in compliance with every specific procedural requirement in the Agreement. This basic fairness is the same as industrial due process. It must be noted, however, that the relationships between the parties here are largely governed by contract rather than by statute as is true in the railroad industry. While some of the precedents

established for the railroad industry will present persuasive analogies, they cannot displace or even authoritatively control the interpretation of the collective Agreement between the parties. Under this Agreement the grievants in this case were entitled to be [15] treated with basic fairness in connection with every step applicable to the processing of a discharge grievance. It is worth repeating, however, that basic fairness is concerned with substance, not mere form. Fairness in procedure is not an abstraction. It takes on meaning in light of all of the facts in the processing of a particular case. After considering the full record in this case and the briefs and reply briefs filed by representatives of the parties, the Neutral Member does not believe that there is any sound basis for concluding that this System Board should refrain from dealing with the merits of these discharge grievances because of some aspect of procedural unfairness.

Issue on the Merits.

Having concluded that it is appropriate for this System Board of Adjustment to consider and determine the merits of the issue submitted to it, it is sufficient to say that the evidence in the record clearly establishes that the Company was justified in discharging Sidney Kanter and Irving Rosen for the manner in which they handled the liquor service on Flight 4 on May 13, 1965. If the evidence against the grievants is credited, there does not appear to be mitigating circumstances suggesting reinstatement.

PAUL H. SANDERS,
(Paul H. Sanders),
Neutral Member.

April 8, 1966

* * *

APPENDIX F

STATUTORY PROVISIONS INVOLVED

45 U.S.C. § 159(3):

Impeachment of award; grounds

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this chapter for such awards, or that the proceedings were not substantially in conformity with this chapter;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board, or subcommittee thereof, for interpretation, as provided by this chapter: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

45 U.S.C. § 181:

Application of sections 151, 152, and 154-163 to carriers by air

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. May 20, 1926, c. 347, § 201, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

45 U.S.C. § 182:

Same; duties, penalties, benefits, and privileges

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151, 152 and 154-163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title. May 20, 1926, c. 347, § 202, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

45 U.S.C. § 184:

System, group, or regional boards of adjustment

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application

of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151-163 and 181-188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181-188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. May 20, 1926, c. 347, § 204, as added Apr. 10, 1936, c. 166, 49 Stat. 1189.

* * *

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1066

IRVING ROSEN AND SIDNEY A. KANTER,

Petitioners,

—versus—

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 1066

IRVING ROSEN AND SIDNEY A. KANTER,

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—versus—

EASTERN AIR LINES, INC.,

Respondent.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

The petition for writ of certiorari seeks review of the judgment of the Court of Appeals for the Fifth Circuit which affirmed the District Court's judgment for Respondent, Eastern Air Lines, Inc. (Eastern).

Petitioners (Plaintiffs Rosen and Kanter) are former flight attendant employees of Eastern. On May 17, 1965, the petitioners were discharged for their handling of the liquor service on Eastern's Flight 4, on May 13, 1965 (Petitioner Rosen was also discharged for his handling of the liquor service on Eastern's Flight 50 on May 14, 1965). (R. 144, 201).[1]

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[1] References R. are to the Record and S.R. to the Supplemental Record.

The Petitioners filed a grievance with respect to their discharge and the Hearing Officer upheld their discharges on May 28, 1965. (R. 137, 140). Petitioners then submitted their grievances to the Eastern Air Lines Flight Attendants' System Board of Adjustment established pursuant to the Agreement between Eastern and the Air Line Stewards and Stewardesses Association (ALSSA) dated April 15, 1965, and Title II of the Railway Labor Act, 45 U.S.C. 151 *et seq.* (R. 134-140, 79-85).

At the hearing before the System Board of Adjustment and on briefs to that Board, three issues were raised by Petitioners: First, the contention that the letters of discharge did not contain the "precise charges" called for by Section 15-A-4 of the Agreement and that Petitioners had in fact never received any "precise charges" (S.R. 5, 7); second, that under paragraph 13 of the agreement between Respondent and ALSSA establishing the said System Board that Board should only consider and review the record made before the First Stage Hearing Officer and should refuse to permit the Defendant to introduce any additional testimony or exhibits (S.R. 10); and third, that under Section 15 of the basic collective bargaining agreement the First Stage Hearing Officer should have relied solely on the evidence introduced at the hearing before him and that he should not have conducted any investigation and should not have relied on the results of that investigation in making his decision (S.R. 12). No attempt was made to prove that the conduct of the Petitioners on the flights in question did not justify their discharge.

These three defenses were argued vigorously at the hearing, all proffered testimony on these issues was admitted into evidence and an opportunity to brief the issues was extended.

By majority decision dated April 8, 1966, the System Board of Adjustment in an Opinion and Award written by Paul H. Sanders, Neutral, upheld the discharge of the Petitioners (S.R. 1-15). On the specific defenses raised by the Petitioners the System Board of Adjustment held: First, that from May 17 to May 24, 1965 there did exist a "formal defect" in the discharges in that the initial letters of discharge were not precise enough in their charges of misconduct—a "defect" which was remedied by specifications furnished on May 24, 1965. As a remedy, the System Board of Adjustment awarded each of the Petitioners one additional week's pay (S.R. 1, 7-10). Second, the System Board of Adjustment held that under the agreement establishing the System Board of Adjustment the Respondent was entitled to introduce testimony in addition to that introduced before the First Stage Hearing Officer (S.R. 1, 10-12). Third, the System Board of Adjustment held that the Hearing Officer was entitled to make an investigation and to rely on the evidence revealed by that investigation as well as the evidence introduced at the hearing before him in making his decision (S.R. 2, 12-15). On the merits, the System Board held that the evidence in the record clearly established that Eastern was justified in discharging the Petitioners (S.R. 2, 15).

The Petitioners then filed the instant actions asking reinstatement, back pay and punitive damages (R. 1, 100). In their complaints the Petitioners, among other issues, raised again the issue of precise charges and the conduct of the First Stage Hearing Officer, but did not raise directly the issue of whether or not the System Board of Adjustment should have been limited to a review of the record before the First Stage Hearing Officer.

The parties stipulated the record and the District Court after argument found for Eastern (Appendix D to Petition).

On appeal to the Court of Appeals for the Fifth Circuit the Petitioners claimed they were denied constitutional and "industrial" due process because (1) no precise written charges had been filed against them as required by the agreement; (2) under the applicable contract provisions, the Hearing Officer should not have conducted his own investigation, and (3) under the agreement the System Board should not have held a *de novo* hearing, but instead should have limited itself to the record made before the Hearing Officer. The Fifth Circuit in a *per curiam* decision affirmed the judgment of the District Court and denied the Petition For Rehearing and Petition for Rehearing en Banc (Appendixes A, B and C to Petition).

The Fifth Circuit reasoned that all these issues involved questions as to the proper interpretation to be placed on various clauses of the agreement between ALSSA and Eastern and that these questions had been finally decided by the prior decision of the System Board of Adjustment.

Questions Presented

Eastern believes that the questions raised by the petition for writ of certiorari are:

(1) Did the issues raised by the complaint relate solely to interpretation to be placed on various clauses of the basic collective bargaining agreement—issues within the exclusive jurisdiction of the System Board of Adjustment—or did the complaint raise issues of due process reviewable by a Federal Court?

(2) Did the complaint state a cause of action in view of the 1966 amendments to the Railway Labor Act?

While the Petition (p. 3) sets forth some six questions, Eastern submits that they are merely conclusionary allegations, wholly unrelated to the issues raised by the complaint or the appeal to the Fifth Circuit. Thus, there will be no attempt to discuss the purported questions set forth in the Petition.

ARGUMENT

I.

The Issues Raised By The Complaint Relate Solely To The Interpretation To Be Placed On Various Clauses Of The Basic Collective Bargaining Agreement—Issues Within The Exclusive Jurisdiction Of The System Board Of Adjustment—Not Due Process Issues Reviewable By A Federal Court.

It has been settled law since at least 1950 that Adjustment Boards have exclusive jurisdiction over disputes involving the interpretation of collective bargaining agreements under the Railway Labor Act.[2] *Slocum* v. *Delaware, L. & W. R. R.*, 339 U.S. 239 (1950).

Not only do Adjustment Boards have exclusive jurisdiction over disputes regarding the proper interpretation of collective bargaining agreements under the Railway Labor Act, but their decisions as to the proper interpretation are final, binding and conclusive and are not subject to

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[2] A narrow exception to this general rule did exist where an employee was discharged and he sued for damages rather than reinstatement and back pay. In such cases the courts, rather than the Adjustment Board, had jurisdiction. *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941). Even this narrow exception seems now to have been cut off. See *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965); *Walker* v. *Southern Railway*, 385 U.S. 196 (1966); *Haynes* v. *United States Pipe & Foundry Co.*, 362 F. 2d 414 (5th Cir. 1966).

review by the courts. *Gunther* v. *San Diego & A. E. Ry.*, 382 U. S. 257 (1965). This Court in *Gunther* said (at page 263):

> "III. Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' The award of the Board in this case, based on the central finding that petitioner was wrongfully removed from service is two fold, consisting both of an order of reinstatement and the money award for lost earnings. Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job merely because one part of the Board's order contained a money award. We hold it cannot. This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board. In *Brotherhood of Railroad Trainmen et al.* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30, the Court gave a Board decision the same finality that a decision of arbitrators would have. In *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, the Court discussed the legislative history of the Act at length and pointed out that it 'was designed for effective and final decision of grievances which arise daily' and that its 'statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board . . . .' 360 U.S., at 616. Also in *Locomotive Engineers* v. *Louisville & Nashville R. Co.*, 373 U.S. 33, the Court said that prior decisions of this Court had made it clear that the Adjustment

> Board provisions were to be considered as 'compulsory arbitration in this limited field,' p. 40, 'the complete and final means for settling minor disputes,' p. 39, and 'a mandatory, exclusive, and comprehensive system for resolving grievance disputes.' p. 38."

The Court went on to say in the *Gunther* case (at page 264):

> ". . . The basic grievance here—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—has been finally, completely, and irrevocably settled by the Adjustment Board's decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."

While the courts have consistently refused to review interpretations of Adjustment Boards on the merits, they have reserved the right to review the procedure before the Adjustment Board to ensure that grievants received due process. This review has been held to be specifically limited to proceedings before the Adjustment Board and the conduct of the Adjustment Board. *Edwards* v. *St. Louis-San Francisco R.R.*, 361 F. 2d 946 (7th Cir. 1966); *D'Elia* v. *New York, New Haven & Hartford R.R.*, 230 F. Supp. 912 (D. Conn. 1964), *aff'd*, 338 F. 2d 701 (2d Cir. 1964).

Moreover, the courts have made it crystal clear that this reservation of jurisdiction to review does not mean that a party can obtain a review of the merits of a decision by presenting the matter in the guise of an allegation of abuse of due process rights. *Bower* v. *Eastern Air Lines, Inc.*, 214 F. 2d 623 (3d Cir. 1954), *cert. denied*, 348 U.S. 871 (1954).

Each of the three points argued by the Petitioners in the appeal to the Fifth Circuit involved only the correct interpretation to be placed on the various clauses of the contract involved. Each of the three points was previously raised before and decided by the System Board.

The Petitioners' argument on the subject of precise charges related solely to Section 15-A-4 of the basic collective bargaining agreement and the interpretation they placed on the language of that Section and the remedy they believed applicable for any violation. The Petitioners' arguments on the extent and type of hearing to be accorded grievants before the System Board were based on paragraph 13 of the agreement between Eastern and ALSSA establishing the System Board of Adjustment and the interpretation they contended should be placed on that paragraph. The Petitioners' argument regarding the investigation and hearing conducted by the First Stage Hearing Officer was based on Articles 15-A(3), (4) and (5) and the interpretations they placed on those paragraphs.

As the decision of the Fifth Circuit points out, the Petitioners did not contend that the System Board of Adjustment in any way acted improperly in arriving at its decisions on those contested issues; they simply contended that the decisions were wrong. A review of the correctness of such decisions is beyond the jurisdiction of the courts even when the courts believe the decision is clearly wrong and even when the results offend their sense of justice. *Hodges* v. *Atlantic Coast Line R.R.*, 363 F. 2d 534 (5th Cir. 1966).

Since the issues raised by the complaint and the issues raised on appeal relate solely to the proper interpretation to be placed on the various contract clauses and do not raise issues of due process, the lower courts were clearly correct in their holdings that the issues raised by the com-

plaint had been submitted to the System Board of Adjustment by Petitioners and decided adversely to them by the Board, and that the decisions on these points were final and binding and not subject to judicial review. The lower courts were also clearly right when they held that they could review only the proceedings before the System Board of Adjustment for the sole purpose of determining that the Petitioners did receive due process and that they could not review the proceedings before the First Stage Hearing Officer.

II.

Under The 1966 Amendments To The Railway Labor Act The Complaint Did Not State A Cause Of Action.

While the Fifth Circuit did not reach Eastern's argument that under the 1966 amendments to the Railway Labor Act the complaint did not state a cause of action, it is submitted that the decision of the District Court could justifiably have been affirmed on that basis.

In *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) the issue was whether or not the procedures for enforcement of National Railroad Adjustment Board decisions set forth in Title I of the Railway Labor Act were applicable to decisions of airline System Boards under Title II. While the decision of the Court points out that Section 153 was not made applicable to the airlines by Title II, it applied the principles of Section 153 to the airlines as a matter of federal law.[3] The Court said:

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[3] The Petitioners maintain in their brief that the applicable statutory provision is 45 U.S.C. §159(3). That section relates to arbitrations of major disputes over contract negotiations, not minor disputes before Adjustment Boards. *Farris* v. *Alaska Airlines*, 113 F. Supp. 907 (W.D. Wash. 1953), cited by Petitioners as their authority that Section 159(3) applies, points out clearly in Footnote 5 that it is Section 153 that governs the finality of Adjustment Board decisions.

"Adjustment board decisions were expressly made final and binding in the 1926 Act, the National Railroad Adjustment Board awards were made enforceable in the federal courts by the 1934 amendments, and the awards under voluntary arbitration agreements were likewise made expressly enforceable by the statute. There is no reason to believe that in 1936 Congress discarded for an entire industry an element essential to a reliable system of settling disputes under existing contracts or that it contemplated awards by adjustment boards the enforceability of which depended entirely upon the desires of the parties or upon state statutes or court decisions. Quite the contrary, the Act, its history, and its purposes lead us to conclude that when Congress ordered the establishment of system boards to hear and decide airline contract disputes, it 'intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice.' *Bower* v. *Eastern Airlines,* 214 F. 2d 623, 626 (C.A. 3rd Cir.); *Washington Term. Co.* v. *Boswell,* 75 U.S. App. D. C. 1, 10, 124 F. 2d 244.

"III. The contract of the parties here was executed under §204 and declares a system board award to be final, binding, and conclusive. The claim stated in the complaint is based upon the award and demands that it be enforced. Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and *are to be answered with due regard for the statutory scheme and purpose.* To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central

must comply, it is because federal law requires its compliance." (Emphasis added).

Effective June 20, 1966, the Railway Labor Act was amended. Paragraph (p) of Section 3 First—the enforcement procedure—was amended and a new paragraph (q) was added giving any aggrieved party the right to petition a district court for review of an Adjustment Board decision, but severely limiting the grounds of such review. This paragraph reads as follows:

"(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order

> to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code."

In view of this Court's conclusion in the *Central Airlines* case that Adjustment Board decisions under Title II of the Act must be enforced in a manner consistent with the "statutory scheme and purpose" of Title I, it is reasonable to assume that the provisions of the 1966 amendments likewise govern the scope of review under Title II and thus apply to this case. *Dominguez* v. *National Airlines, Inc.*, 279 F. Supp. 392 (S.D.N.Y. 1968); *Northwest Airlines, Inc.* v. *Air Line Pilots Assn.*, 373 F. 2d 136 (8th Cir. 1967), *cert. denied*, 389 U.S. 827 (1967).

Although the System Board's consideration of this case was prior to the effective date of the 1966 amendments, those amendments have retroactive effect and govern this appeal. *Railroad Trainmen* v. *Denver Rio Grande Western R.R.*, 370 F. 2d 833 (10th Cir. 1966). See also *Southern Pacific Co.* v. *W. H. Wilson*, 378 F. 2d 533 (5th Cir. 1967) and *Sweeney* v. *Florida East Coast Ry.*, 389 F. 2d 113 (5th Cir. 1968).

The Petitioners have not contended that the System Board failed to comply with the requirements of the Railway Labor Act. The System Board obviously had jurisdiction to decide whether or not the Respondent had complied with Section 15-A-4 of the basic collective bargaining agreement (precise charges); whether or not the First Stage Hearing Officer was in compliance with Section 15 and whether or not the System Board was limited to the record before the First Stage Hearing Officer under the

agreement establishing the System Board of Adjustment. Nor is there any allegation or evidence that any member of the System Board was guilty of fraud or corruption.

Thus, none of the three grounds set forth in the 1966 amendments for setting aside a decision of a Board of Adjustment exists in this case.

CONCLUSION

The Petition for Certiorari fails to establish that customary "considerations governing review on certiorari", as spelled out in this Court's Rule 19, call for grant of the writ in this case. The decision below not only does *not* conflict with a decision of this Court or of any Court of Appeals but, as demonstrated above, it is consistent with the long line of decisions rejecting review of Adjustment Board decisions. The Petition contains no suggestion that the lower courts departed from the "accepted and usual course of judicial proceedings".

This case involves nothing more or less than an attempt to have the Federal Courts rule on the merits of an arbitration decision as to the proper interpretation of various clauses of a collective bargaining agreement entered into under the Railway Labor Act. For almost twenty years this Court has repeatedly and consistently ruled that neither Federal nor state courts may review the merits of such decisions.

Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

SUPREME COURT, U. S.

Supreme Court

OF THE

United States

OCTOBER TERM, 19[illegible]

No. 1066

IRVING ROSEN and SIDNEY A. KANTER,
Petitioners,

vs.

EASTERN AIR LINES, INC.,
Respondent.

PETITION FOR REHEARING

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Respondent.

PETITION FOR REHEARING

Petitioners IRVING ROSEN and SIDNEY A. KANTER, pursuant to the provisions of Rule 58(2) of the Rules of the Supreme Court of the United States, respectfully pray that this Court grant rehearing of its order dated the 7th day of April, 1969, which denied the petition for writ of certiorari filed in this case, and that the Court now grant certiorari.

This petition is based upon intervening circumstances of substantial or controlling effect relating to issues originally urged in support of the grant of the petition for writ of certiorari and which demonstrate the urgent need for a clear-cut pronouncement and resolution by this Court of an important question of Federal Law upon which Courts of Appeal in the several circuits are in conflict and substantial dispute.

The petition for writ of certiorari previously filed herein presented, *inter alia*, the following question (at p. 4):

> "3. Where an arbitrator, in an attempt ostensibly to interpret the provisions of a collective bargaining agreement, ignores and disregards the plain and unequivocal requirements of the agreement and denies an employee the benefits thereof, or acts with respect thereto in an arbitrary, capricious or unreasonable manner, may such conduct be reviewed and remedied by the Federal Courts?"

The petition for certiorari discussed the importance of this question raised by the Fifth Circuit's decision in this case and its impact upon the administration of justice in the Federal Courts. This issue arose by virtue of the decision of the Fifth Circuit to the indisputable effect that where questions of "interpretation" of the collective bargaining agreement or questions partaking of the aspects or characteristics of "interpretation" of the agreement have been decided by an arbitrator under the procedures of the Railway Labor Act, 45 U.S.C.A. §§ 151 et seq., and §§ 181-188 (as the same apply to air carriers)

such decisions are finally and absolutely foreclosed from judicial review and inquiry. On this basis the Fifth Circuit, and the District Court before it, made no attempt to consider or resolve the subsidiary questions and issues presented and raised before them of whether the arbitrator's decision and action had its foundation and base in the collective bargaining agreement, whether the arbitrator's interpretation of the contract, from which he derived the authority to act and rule as he did, was reasonably debatable, and whether such decision and action turned upon some contractual provision which was unclear or ambiguous to the point where it required interpretation by the arbitrator. Resolution of such issues was, of course, obviated by a blanket general ruling to the effect that this was strictly a "hands-off" area for the Courts.

Since the filing of the petition herein the Court of Appeals for the Third Circuit has entered its decision to the exact opposite effect in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123. Said decision was entered on January 14, 1969 but was not published until March 24, 1969, and was not available for use by petitioners when the petition herein was drafted or filed. Therein the Third Circuit defines the "threshold question" as: "What is the proper role of a court in reviewing an arbitrator's interpretation of the provisions of a collective bargaining agreement?" The Third Circuit's decision in *Ludwig Honold* is divided into two distinct phases of inquiry: first, whether the Courts may under, any circumstances, review the arbitrator's interpretation (and under just what circumstances court review is authorized and warranted); second whether the arbitrator's interpretation in the premises was of such nature as would compel in-

terposition of judicial action. We are not here concerned with the second aspect. It is in the first area of inquiry that the decisions of the Third Circuit and the Fifth Circuit below are at complete variance.

The opinion of the Third Circuit in *Ludwig Honold* proceeds upon an analysis of the basic philosophy enunciated by this Court in the case of *United Steelworkers of America v. Enterprise Wheel and Car Corp.* (1960) 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424, and the developing lack of uniformity in subsequent Circuit and District court decisions proceeding therefrom and the different "standards" which have emerged. The Third Circuit observed that while *Enterprise* "elevated the arbitrator to an exalted status" (i.e. there could be no interference with his award simply because a reviewing court might differ with him in his interpretation of the provisions of the contract), nevertheless the courts still "held a check-rein on him—confining his zone of action to the four corners of the collective bargaining agreement."

The Third Circuit, following a discussion of the differing applications and standards resulting from *Enterprise*, running the gamut those cases where court review was held available in certain limited areas to those where, like the Fifth Circuit below, there is permitted no review whatsoever of the arbitrator's interpretation, and following an evaluation of such decisions reached the conclusion (at p. 1128) that where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop . . . a reviewing court may disturb the award." Going one step farther (and this is a highly critical aspect) the Third Circuit reached a conclusion to the effect that if the lan-

guage of the collective bargaining agreement (not in isolation, but in light of all relevant circumstances) was "clear and unambiguous" the arbitrator would have no authority to disregard the same and any departure therefrom would authorize court review.

These are precisely the premises urged for consideration by petitioners in the Fifth Circuit which were ignored and avoided in the latter's decision, as aforesaid, and obviated by the conflicting rule of law established therein. They have, of course, been made issues herein and since there now exists a clear and express conflict of decisions between the Third and Fifth Circuits on an important question of federal law, it is appropriate that the question be reviewed by this Court.

CONCLUSION

For the reasons set forth in this petition for rehearing, as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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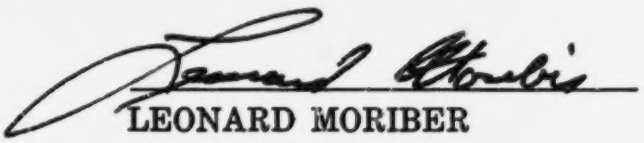
CERTIFICATE OF COUNSEL

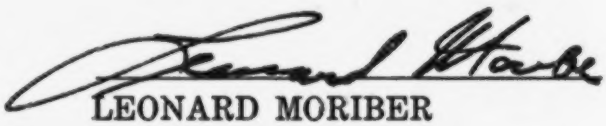
Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.



LEONARD MORIBER

CERTIFICATE OF SERVICE

I, LEONARD MORIBER, attorney for the Petitioners herein, and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 25TH day of April, 1969 I served copies of the above and foregoing Petition for Rehearing upon all counsel of record for the Respondent by mailing copies thereof in a duly addressed envelope with air mail postage prepaid to W. GLEN HARLAN, ESQ., Room 1401—10 Rockefeller Plaza, New York, N. Y. 10020, E. SMYTHE GAMBRELL, ESQ., GAMBRELL, RUSSELL, MOYE & KILLORIN, 4000 First National Bank Building, Atlanta, Georgia 30303, and WILLIAM G. BELL, JR., c/o Eastern Air Lines, Inc., Miami International Airport, Miami, Florida 33148.



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